No. 94-287

(2)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANDY JAMES GILLILAN,

Petitioner,

v.

TECCOR ELECTRONICS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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Question Presented

Whether the court of appeals, adhering to the Court's decision in *St. Mary's Honor Ctr. v. Hicks*, correctly vacated the district court's judgment on a jury verdict and remanded the case for new trial, when the district court had instructed the jury that petitioner had established age discrimination by a preponderance of the evidence if the jury disbelieved the employer's explanation.

List of Parties, Affiliated Corporations, and Interested Persons

The parties are shown in the caption; Teccor Electronics, Inc.'s parent companies are Ranco Incorporated of Delaware, Mitsubishi Materials Corporation, and Siebe, Plc.

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BRIEF IN OPPOSITION

Respondent respectfully prays that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the court of appeals filed March 31, 1994 (incorrectly shown as May 31, 1994 in the appendix to the petition[1] at 1a) that vacated the judgment of the district court and remanded this case for new trial consistent with this Court's decision in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. ____, 113 S. Ct.

[1]Herein cited as "App.".

2742 (1993). Petitioner filed a suggestion of rehearing en banc, which was denied on May 16, 1994. The trial court set the case for retrial on August 15, 1994 but continued the case to allow petitioner to bring his petition for writ of certiorari.

The appellate issue in this case is the correctness of the trial court's instruction of the jury on the law and not the evidence presented in the case, so a lengthy statement of the facts of the case is neither necessary nor appropriate. Petitioner was hired by respondent at age fifty-nine and terminated for poor performance eight years later. The facts were vigorously contested at trial, with substantial evidence that respondent's termination of petitioner was nondiscriminatory. Petitioner could testify to no discrimination from his own knowledge. Petitioner offered no direct evidence of any discriminatory acts or statements by the supervisor who made the decision to fire petitioner. Testimony about alleged age-discriminatory statements attributed to the general manager were all expressly denied by him. The rest of petitioner's case was circumstantial.

Petitioner filed charges with the Equal Employment Opportunity Commission which, upon investigation, found no evidence of a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Petitioner then brought this lawsuit claiming a violation of the ADEA, the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1132(c), and intentional infliction of emotional distress.

At the conclusion of a jury trial, respondent preserved its objections to the trial court's charge to the jury. The jury returned a verdict that respondent discriminated against petitioner on the basis of age, but

not willfully. The jury rejected petitioner's claim of intentional infliction of emotional distress. The trial court found no violation of ERISA and entered judgment granting petitioner back pay, front pay, attorneys' fees, and costs. (App. 2a n.1)

Respondent timely appealed, complaining of the district court's jury instructions and errors in admission of evidence. (App. 3a) Petitioner did not cross-appeal.

The court of appeals reversed the trial court's judgment and remanded the case for further proceedings because the trial court's charge to the jury, taken as a whole, was legally incorrect and inconsistent with the Court's decision on the plaintiff's burden of proof in *St. Mary's Honor Ctr. v. Hicks*. (App. 1a, 3a-4a)

ARGUMENT

I. There Is No Conflict Among the Circuits.

Petitioner is incorrect in asserting that the ruling of the court of appeals in any way created a conflict between the circuits, that it misconstrued or erroneously applied *St. Mary's Honor Ctr. v. Hicks*, or that it implicated the evidentiary standard for a plaintiff to meet at trial. As petitioner correctly notes, the sufficiency of the evidence was not before the court below. The only substantive issue addressed and decided by the court of appeals was the trial court's faulty jury instruction of the law.

Petitioner's whole "pretext-plus" discussion, with which he tries to impeach the Fifth Circuit's decision, addresses issues that are not involved either in the decision below or in this Court. The only proposition for which the court below cited its prior opinion in *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 n.4 (5th Cir. 1993), is that *St.*

Mary's applies to ADEA cases as well as Title VII cases. (App. at 3a) The court of appeals' decision did not even address evidentiary standards, much less create a conflict among the circuits on such an issue.

Petitioner unnecessarily strays beyond the issues raised by respondent's appeal and the decision below to pursue this alleged conflict. Attempting to show a conflict between the Fifth and Second, Seventh, and Ninth Circuits, he cites *Bodenheimer* and other decisions of the Fifth Circuit for propositions not relied on in the decision below. Even were such a conflict to exist, it it is not presented for review on the present petition for certiorari.

II. On the Sole Issue Involved in Respondent's Appeal, the Decision of the Court of Appeals Was Correct.

The only question fairly presented by the petition is whether the court of appeals considered the trial court's charge as a whole when it determined that the trial court improperly instructed the jury. Demonstrably, it did so. Moreover, respondent respectfully suggests that the question whether it did so is not of sufficiently wide federal importance to warrant review by the Court.

The court of appeals correctly found the trial court's charge, read as a whole, to be harmfully erroneous under *St. Mary's*. In the critical portion of the Fifth Circuit's decision, it said:

> The jury instructions, taken as whole, do not comport with *St. Mary's*.
> * * *
>
> The district court erred . . . when it instructed that

> When all legitimate reasons for terminating a person from employment have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, who we generally assume acts only with some reason, based its decision on an impermissible consideration such as age.

This instruction would have led the jury to believe that if an employer cannot provide legitimate reasons for termination, it has engaged in age discrimination "more likely than not." Because a plaintiff who proves a claim "more likely than not" would satisfy the preponderance-of-evidence standard, the jury well may have incorrectly reasoned that Teccor's proffered explanations were a pretext, that rejection of Teccor's proffered explanations meant that "more likely than not" Teccor had discriminated against Gillilan, and that therefore Gillilan had established by a preponderance of the evidence that Teccor had engaged in age discrimination.

(App. at 4a.)

The district court's error and the harm to respondent are even more evident when the jury charge is read "as a whole" to include the trial court's instruction to the jury on the meaning of "preponderance of the evidence" (omitted from petitioner's appendix), which was as follows:

> A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is *more likely true than not true*. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is *more likely so than not so*. (emphasis added)

Under this general instruction and the instruction quoted above in the court of appeals' decision, even though the jury may have doubted that petitioner had carried his burden of proving age discrimination, the jury was effectively instructed three times that petitioner had met his burden of proving that the termination was based on discrimination if the jury was dissatisfied with respondent's explanations. This is flatly contrary to the Court's decision in *St. Mary's*, and was correctly disapproved by the court below.

Even under the district court's faulty charge, the jury refused to find respondent's alleged discrimination to be willful. It is therefore plausible and consistent to view the jury's finding of discrimination to have resulted from the faulty jury charge which in essence instructed the jury that petitioner had proved discrimination if the jury

disbelieved respondent's proffered reasons for terminating petitioner.

Petitioner surprisingly relies on *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985), which has been disapproved by the Court as well as by the Fifth Circuit. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. at 2750; *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir. 1988). *St. Mary's* specifically rejected *Thornbrough's* inference from *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), that rejection of the employer's proffered reasons resurrects an employee's prima facie case.

Petitioner argues that the judgment should not have been reversed because the jury might have decided on a ground that was supported by sufficient evidence. Petitioner argues that "[e]ven if the jury instruction was somewhat deficient" (Pet. at 18) the sufficiency of the evidence should be re-analyzed by the Court in the exercise of its supervisory powers (Pet. at 20). But petitioner's ambitious request goes far beyond the appropriate office of a writ of certiorari. The decision of the court of appeals was based on the legal sufficiency of the trial court's instructions and not on the factual sufficiency of the evidence. Having found the instructions erroneous, the court of appeals correctly remanded the cause for further appropriate proceedings. *See Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992), *citing Griffin v. United States*, 502 U.S. 46 (1991) (when a jury has alternatives for reaching its verdict but one of them is based on an incorrect statement of the law, a judgment on the verdict must be reversed and remanded for new trial).

CONCLUSION

Instead of retrying his case with a correct jury charge consistent with *St. Mary's*, petitioner now seeks review of a decision with which he is disappointed but that is of no concern beyond his individual case. Accordingly, and for the other reasons set forth in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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